



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

E-Consumer Protection

Citation for published version:

Brown, A, Schafer, B, Guadamuz, A & Walker, E 2010, *E-Consumer Protection: A Public Consultation on Proposals*. SCRIPT Opinions, no. 10: 2010, AHRC Research Centre for Studies in Intellectual Property and Technology Law. <<http://www2.law.ed.ac.uk/ahrc/opinions/E-Consumer%20Protection-Opinions%20Page.pdf>>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

© Brown, A., Schafer, B., Guadamuz, A., & Walker, E. (2010). E-Consumer Protection: A Public Consultation on Proposals. (SCRIPT Opinions; No. 10: 2010). AHRC Research Centre for Studies in Intellectual Property and Technology Law.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



E-CONSUMER PROTECTION A PUBLIC CONSULTATION ON PROPOSALS

Dr. Abbe E. L. Brown
Professor Burkhard Schafer
Andrés Guadamuz
Elisa Walker*

Response to consultation 10: 2010

Consultation Question 1. What should the priorities be for e-consumer protection?

Information presented by the Office of Fair Trading shows that there are serious difficulties in relation to the investigation of Internet-related complaints. The functions of Trading Standards Services (TSS), Regional Intelligence Officers (RIOs), Serious Organised Crime Agency (SOCA), the Police, and other organizations are overlapping. At the same time, the absence of internal coordination is producing gaps between functions.

Enforcement in this context should be awarded the highest priority.

Enforcement is a key element to build public trust in a legal system that intent to provide protection to e-consumers. This requires both speedy and visible enforcement – to create trust, it is not sufficient that individual cases of grievances are addressed, but that the wider public sees this to be done. All efforts developed for empowering consumers, and promoting business compliance are likely to fail if the administrative system is unable to guarantee an effective protection whenever e-consumers are affected in their rights. Mainly through enforcement e-consumers will be stimulated to participate in the e-commerce, satisfying Government and businesses expectations.¹ Also, enforcement is the element that will allow the UK to meet the effectiveness standards that was suggested by the OECD for consumer protection in electronic commerce.²

This is the one aspect where the government has to assume sole responsibility, or at least the lead role, focussing in particular on streamlining and unifying the procedural aspect

*Dr. Abbe E. L. Brown, Lecturer in Information Technology Law, University of Edinburgh; Professor Burkhard Schafer, Professor of Computational Legal Theory, University of Edinburgh; Andrés Guadamuz, Lecturer in E-Commerce Law, University of Edinburgh; Elisa Walker, Lawyer.

¹ E-Consumer Protection, A Public Consultation on Proposals, July 2010, available at <http://www.oft.gov.uk/OFTwork/consultations/current/eProtection/>, at 1.

² Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, available at http://www.oecd.org/document/51/0,3343,en_2649_34267_1824435_1_1_1_1,00.html, at 1.

by removing overlaps and gaps between different state agencies. By contrast, limitations in the other aspects of consumer trust, empowering consumers and promoting business compliance require a lead role from industry. These approaches can best be developed by private organizations such as associations related to electronic commerce or also non-governmental organizations. These other entities should of course strongly cooperate in the projects that were already defined by the government. For instance, they can stimulate the use of self-regulation, create a space that would clarify the level of protection available for C2C transactions, or develop education and awareness campaigns.³

Consulation Question 2. Do you agree with the general approach of encouraging market based solutions supported by targeted enforcement, education, and influencing? Why or why not?

Every problem regarding the regulation of the Internet will be confronted with the decision of determining how different regulatory approaches can be balanced. Market based solution can represent an optimal way of solving these problems only if conditions for an efficient market are met – which includes transparency and low transaction costs. These conditions however are fragile and subject to change. For supporting and trusting in this method, the development of constant monitoring by public and civil agencies is essential. Only then market-based solutions can be corrected and satisfy standards of fairness. The advantage of a market base solution is its dynamism, which turns it to a method that adapts easily to e-consumers demands and expectations.

There are concerns that should be highlighted about market-based solutions. The first concern is about homogeneity. The difficulty that arises with market-based solutions (assuming that they are working properly) is that they do not necessarily, or even typically, result in uniform solutions for similar problems. The consultation text indicated that there are interesting ranges of market solutions for C2C transaction protection, such as Amazon's A to Z guarantee, eBay and Paypal's buyer protection programme, or protection given by Seatwave or Viagogo for ticket sales. This means that e-consumers will be exposed to a considerable variety of regulations, imposing on them costs to research the level of protection they enjoy. This can discourage them to deal with different companies. Thus, market based solution can create de-facto lock-ins (because getting informed about new rules, even if more advantageous, is time consuming) and thus diminish the evolution of a competitive market, (affecting small and medium enterprises in particular). Therefore, it can create obstacles for one of the main objectives of the OFT.⁴

The second concern is about enforceability. Market based solutions can create fair and efficient solutions for e-consumers typically if they exists “in the shadow of the law”, that is if legal alternatives exist as a fall back. Visible enforcement is therefore a necessary condition to incentivise the creation of efficient market based solutions.

³ E-Consumer Protection, A Public Consultation on Proposals, July 2010, available at <http://www.oft.gov.uk/OFTwork/consultations/current/eprotection/>, at 29, 30.

⁴ E-Consumer Protection, A Public Consultation on Proposals, July 2010, available at <http://www.oft.gov.uk/OFTwork/consultations/current/eprotection/>, at 4.

Consultation Question 3. Do you agree with the focus of the three areas of empowering consumers, promoting business compliance and making enforcement more effective? Why or why not?

The analysis developed in each annex of this public consultation shows the importance of focusing on empowering consumers, promoting business compliance, and making enforcement for protecting e-consumers. This selection incorporates all the relevant factors of e-commerce. Also, it highlights the way every of these factors can be improved.

E-consumers are usually presented as people that are “product aware, have greater access to reliable product data in making rational purchasing decisions, enjoy a wider choice among goods and service and display greater willingness to resolve disputes in cyberspace.”⁵ The analysis developed by OFT shows that some of these elements are not necessarily satisfied by e-consumers.⁶ Advances in the three foci identified by the government will allow consumers to satisfy the standards that companies should fulfil. The notion of the fully informed consumer is particularly problematic where it comes to an understanding of the full impact of market based (essentially contractual) methods of protection. While simple price comparisons, especially if assisted by comparison websites, is within the ability of most consumers, researching, contrasting and comparing competing protection solutions will be beyond many of them.

Consultation Question 4. Are there any key areas in relation to businesses or consumers that we are missing?

The consultation text identifies some problems that are arising in relation to some legal concepts whose definitions are uncertain. For instance, it is often difficult to determine if an e-contract is about goods or a service. The application of those definitions carries important legal consequences for businesses and consumers (duties, expectations, etc). Even though the consultation text recognise the problems, it does not propose a way of dealing with it.

Consultation Question 5. Are there any general comments you would like us to take into account when developing the e-consumer protection strategy?

One issue that should be highlighted is the importance of respecting restrictions by Data Protection principles in relation to the enforcement aspect.

In the Annex concerning monitoring issues, there are some concerns about the restrictions that Data Protection can impose on the collection of information for improving enforcement. With regards to that concern, it is important to keep in mind that the regulation about data protection aims to benefit public interests that are as important as the necessity of having an e-commerce system working properly.⁷ Privacy is not just an individual right but also a social value.⁸ Therefore, the government should not

⁵ Trakman, Leon E, “The Boundaries of Contract Law in Cyberspace,” (2009) *International Business Law Journal*, at 161, 162.

⁶ <http://www.oft.gov.uk/OFTwork/consultations/current/eprotection/>

⁷ Data Protection Directive (Directive 95/46/EC)

⁸ Cockfield, Arthur J., “Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies,” (May 2007), 40.1, *U.B.C. Law Review*, p. 41, available at SSRN:

consider data protection as an obstacle for achieving economic success, but as another relevant element that must be respected in the public sphere. Similarly, businesses must not hide behind DP principles to avoid its responsibility for consumer protection.

ANNEXES

Empowering Consumers

EC1. Besides providing advice and information, how else can we encourage consumers to report problems to the online reporting system? Would providing feedback on the outcome of their complaint be a strong incentive for consumers if it can be done cost effectively?

Unquestionably, a good way for encouraging consumers to report a problem is allowing them to have information about the outcome of their complaint. This will encourage the consumer that went through a difficult situation to keep in touch with the OFT. As noted above, market based solutions assume often an unrealistic ideal of the informed consumer. In reality, access to information and the ability to understand and process it is unevenly distributed in society, with certain group particularly vulnerable “Repeat victimisation” will therefore be the norm, not the exception. Consumers who do not receive feedback on the handling of their complaints will be unlikely to avail themselves of complaint mechanisms if they perceive them as inefficient the first time round. The Charity Commission webpage could be used as a model for allowing consumers to get involved with the online reporting system.⁹

If the OFT also want to attract new consumers, making available statistics, case studies and examples of successful complaint settlement, and information about what is happening with e-consumers reports, is likely to have positive effects.

EC2. What other things should OFT do to fully utilise this online point of contact?

The online point of contact could also recommend some places (spaces) where e-consumers have had good experiences so it could be use as a guide for new e-consumers and also as an incentive for businesses to adequate their standards in order to be recommended. Positive feedback and examples of best practice are as relevant as examples of successful sanctioning of bad conduct. Indeed, if the aim is to create consumer trust, they are highly likely to be more efficient – even successful resolution of a problem alerts consumers that there was a problem to be settled in the first place – an inherent problem of customer rating and feedback systems.

EC3. What are the barriers to carrying out joint education/marketing campaigns?

Three barriers will be explained in relation to a join education/marketing campaign.

<http://ssrn.com/abstract=1031964>.

⁹ <http://www.charity-commission.gov.uk/index.aspx>

The first one consists of finding a balance between both interests. An education campaign should encourage e-consumers to be informed about their rights in relation to e-commerce in order to stimulate their participation on that market. That strategy can create more defensive e-consumers because of the awareness of new and emerging problems. It is important that information will not stop consumers of taking the advantages offered by e-commerce. That will be the challenge for the marketing side of the campaign. Two very different campaigns can be used as a model for showing the different approaches that an education and marketing campaign use for spreading their messages. Look at the contrast between the Make Mine Milk¹⁰ (run by the Milk Marketing Forum) and Have you Clicked?¹¹ (Promoted by the Scottish Government).

The second barrier is the challenge of coordinating entities with different expectations about the campaign. According to the OECD, consumer education should be provided not only by governmental agencies but also by non-governmental entities, such as parents association, and by stakeholders.¹² An education/marketing campaign will have to be able to make all these entities feel part of the same objective.

Finally, education campaigns require trust on the side of the persons educated. Experience with other regulatory problems shows that the perception of conflicts of interest easily undermine this trust, however unjustified in reality – a frequently voiced “concern” about e.g. governmental education projects on issues such as vaccination or energy efficiency is the accusation of hidden agendas in favour of industry interests.

EC4. Which organisations should be involved? Are businesses interested in becoming involved? How?

The OECD proposal,¹³ considers it ideal if all entities involved in e-commerce would work together in an education/marketing campaign (government, civil societies entities, and businesses). There are obvious shared interests between business, government and civil society that should serve as incentive for such an approach. However, as noted above, care has to be taken that the credibility of governmental and civil society stakeholders is not compromised by such joint activities. Clear ground rules on business involvement are therefore necessary, that visibly and openly acknowledge the potential of conflicts of interests, and how they are resolved in a way that prioritises the interests of consumers.

EC5. Are there other tools that could assist consumers in seeking redress?

Many transactions will be too small in value to make it worthwhile seeking redress, even if the mechanisms are as straightforward, cheap and easy to use as possible. However, in an online environment, grouping together several complaints of a similar nature in “class action” type procedures seems feasible, especially if assisted by technology (e.g. at the online point of contact). Being able to “join an action/complaint” at the click of the

¹⁰ <http://www.makeminemilk.co.uk/Default.aspx>

¹¹ <http://www.dontriskit.info/seatbelts/>

¹² www.oecd.org/document/2/0,3343,en_2649_34267_44110274_1_1_1_1,00.html, at 6.

¹³ www.oecd.org/document/2/0,3343,en_2649_34267_44110274_1_1_1_1,00.html

mouse would remove some of these obstacles, and while the distribution of any awards will be more difficult. However, especially in minor transactions consumers may often feel that a more substantive rebuke of a non-compliant business on the basis of a co-ordinated complaint will address their sense of having been wronged even if they don't benefit personally more satisfactorily than a very small payment to them.

EC6. What barriers are there to consumers obtaining redress?

Education is always an important barrier. Consumers should know that there are inexpensive and effective avenues for redress available for them. Not having a universal, standardized ADR general system available for consumers can create insecurities about resources available for e-consumer.

Dealing with cross-border problems can also be a relevant factor for discouraging e-consumers taking actions. This problem was one of the issues identify by the European Union in its Proposal for a Directive of Consumer Rights.¹⁴ According to the consultation text, the EC Digital Agenda intends to propose a EU-wide online dispute resolution system for e-commerce transactions. The UK should think about the possibility of creation a bilateral arrangement with other countries so it will provide temporary tools for dealing with the cross-borders difficulties. The OECD also recommends this possibility.¹⁵

EC7. How could we ensure that Alternative Dispute Resolution processes are used by consumers, and taken seriously by business?

EC8. How can we encourage businesses to improve their complaints handling processes?

The answers to EC7 and EC8 partly overlap, but also show a potential divergence of interest between consumers and business. Negotiated settlements through ADR processes work best if they are “in the shadow of the law” - that is if a negotiated settlement is for both parties more advantageous than the best non-negotiated outcome would be. For the consumer, this can mean a higher payment, for the business avoidance of bad feedback, negative publicity or litigation costs.

For the consumer in particular (but also for SMEs) this requires access to information of what the likely non-negotiated outcome would be. This requires legal knowledge, but also access of past decisions in an easily accessible way. Technological solutions, from the most simple (online collections of decisions with good search engine) to the most sophisticated (AI supported, intelligent ADR systems¹⁶) either do not exist, or have

¹⁴ http://ec.europa.eu/consumers/rights/cons_acquis_en.htm

¹⁵ OECD Recommendation on Consumer Dispute Resolution and Redress, http://www.oecd.org/document/4/0,3343,en_2649_34267_38960053_1_1_1_1,00.html, at 12.

¹⁶ Bellucci, Emilia, Lodder Arno R, Zeleznikow, John, “Integrating Artificial Intelligence, Argumentation and Game Theory to Develop an Online Dispute Resolution Environment,” (November 15-17, 2004), Proceedings of the 16th IEEE International Conference on Tools with Artificial Intelligence, p.749-754; Zondag, B., Lodder, A.R, “Towards the Development of Generic Computer Assisted Dispute Resolution, Based on Conflict Theory” (2005), see <http://pubs.cli.vu/pub248.php>

disappointing uptake.

Promoting the development and implementation of such support is one role the OFT could take on.

However, as noted above, keeping settlements confidential is a key “bargaining chip” in the individual settlement, but can undermine the public uptake of the approach – other consumers would ideally need to know about the outcome of such settlements to know in advance they are efficiently protected, and also to choose the right strategy in ADR if there are problems.

The limited uptake of technology enhanced ADR, and ADR in general by SMEs, could be improved through the creation of a benchmarked model that can be easily adapted by businesses and comes with an official seal of approval. This can be particularly useful for small and medium enterprises because they will know which are the essential elements that should constitute this mechanism, without having to contract special services or invest in risky software development projects. For achieving this result, the distribution of the model should be complemented with basic education programmes. The other advantage of this model is that it will standardize fair legal terms. This will restrict the uncertainty that could exist in relation to the existence of an arbitration clause, avoiding cases such as *Combe v. PayPal*.¹⁷

EC9. What do you or your organisation consider to be best practice to effectively target consumer education messages to those who need it?

EC10. Do you agree that reviews or other research mechanisms are a useful tool for consumers? How can consumers be encouraged to use these prior to carrying out a transaction?

Reviews are very useful tools for consumers because they represent one of the few instances that allow direct contact between consumers. Consumers are able to share experiences in an informal scenario and they do that just for helping others. TripAdvisor and bikebuying.com¹⁸ are examples of reviews that work on a big scale and are used by consumers.¹⁹ A different type of webpage that also includes good reviews is Halford.²⁰

Consumers will be encouraged to use reviews prior to carrying out a transaction only if they consider that the information available in those sites is trustworthy. Recent high profile examples of manipulation of review systems (e.g. by phony positive reviews by the business owner or associates, or negative reviews by competitors) pose a real danger to undermine the system. Technological solutions that guarantee authenticity of the

¹⁷ *Craig Comb, et al. v. PayPal, Inc.* Cases No. C-02-1227 and C-02-2777 JF (N.D. Cal., August 30, 2002).

¹⁸ http://www.bikebuying.com/bicycle_reviews/bicycle_reviews.htm#mountain_bike_review

¹⁹ <http://www.tripadvisor.co.uk>

²⁰ <http://www.halfords.com/webapp/wcs/stores/servlet/SearchCmd?srch=bikes&x=0&y=0&action=search&storeId=10001&catalogId=10151&langId=-1>

reviews/ratings, together with legal sanctions (possibly even fraud prosecutions in cases of more serious abuse) can partly address this issue.

EC11. How can we encourage consumers to share experiences in order to reduce collective consumer detriment online?

The wikipedia experience shows great willingness of people to make their knowledge available for free – and also that monetary reward systems can have surprisingly and counter-intuitively negative consequences for that willingness to share.²¹ However, the wikipedia experience shows also that “idealistic” rewards (“top reviewer” “gold star” a hierarchy of reviewers where people move up the rank, etc) can incentivise contributors. Both state and NGOs could provide such methods of recognition.

Ebay rating constitutes another example of a system that encourages consumers to share experiences.²²

EC12. How can we encourage businesses to make payment systems safer?

Under-reporting of fraud and security breaches is a well known problem. The ability to keep issues secret is a major disincentive to improve services, and also undermines any market-based solutions (since ideal markets assume full information). Legal reporting requirements that then inform published league tables would go a long way to address this issue – but with the disadvantage that they can also create a climate of fear and distrust. Reporting best practice rather than breaches (“100 days without a problem”) could partly address this issue, similarly to the approach taken by health and safety.

EC13. How can we encourage consumers to transact more safely online?

Education has a role to play, but ultimately due to the required level of technical knowledge involved a limited role only. Ideally, the main impetus should come from technologies that ensure “safety without thinking about it”, and allow unsafe transactions only if a consumer intentionally chose to take the risk. So rather than telling people to check if a website uses appropriate encryption before making a transaction, a consumer would be prevented by a pop up to enter credit details on an unsafe website unless he decides to override the warning.

Other measures such as the Visa verification scheme are at present not very user friendly, and the more widespread use of identity management systems could assist in safe yet user friendly authentication methods.²³

EC14. What can be done to improve the information provided to consumers on instant cash transfers or the security arrangements relating to these payments?

²¹ Tapscott, Don and Anthony Williams. *Wikinomics*. City: Portfolio, 2006.

²² <http://pages.ebay.co.uk/help/feedback/about-feedback.html>

²³ Lusoli, Wainer; Miltgen, Caroline (2009), “Young People and Emerging Digital Services. An Exploratory Survey on Motivations, Perceptions and Acceptance of Risks”, (March 2009) *JRC Scientific and Technical Reports* (Sevilla: EC JRC IPTS) (EUR 23765 EN).

According to the public consultation, the UK is seen as being at risk to frauds related to instant cash transfers. Maybe it is possible to incorporate instantaneous messages with basic and direct information for e-consumer.

Promoting Business Compliance

BC1. Why do businesses not use guidance more often, and what can we do to encourage them to?

According to the consultation text, the problem of not using guidance is usually presented with small and medium enterprises (SMEs). Large companies have legal and manager teams that do get engage with the material provided by the government.

The best way of resolving this conflict is by generating activities, such as workshops, or basic educational programmes. These instances will allow SMEs to participate, get engaged with the guidance, and also share experiences about online services so they can have an idea how the market is working for the others.

BC2. How can we make guidance on existing and future regulation in this area more accessible and user friendly (for example, are there exemplars we could follow and is there a specific location where guidance should be held such as Directgov, OFT website, etc)?

We noted above that the segmentation of relevant authorities is one of the problems in supporting consumers and businesses. This also applies to the provision of information. While the idea of a single point of contact is superficially appealing, it assumes a “uniform” user profile. In reality, Internet users are very diverse, and expect to get information from a variety of sources. Multiple communication challenges are therefore more appropriate for the Internet than single points of information, especially given the low costs to mirror websites.

Experience from education in general indicates that case studies, “problem based learning” is more efficient than having abstract rules and regulation only.

BC3. Is the current level of consumer-to-consumer regulation sufficient, given the nature of the market?

The regulation of consumer-to-consumer transactions is a not well-explored area of the law. On the one hand, the problem of dealing with C2C transaction is that the regulation of the Consumer Protection (Distance Selling) Regulations 2000 is not applicable. On the other hand, the European Union is discussing a proposal for a Directive on Consumer Rights, which has the purpose of contributing to the better functioning of the business-to-consumer internal market by enhancing consumer confidence and reducing business reluctance to trade cross-border.²⁴ Thus, this Directive does not intend to regulate consumer-to-consumer. At the same time, attempts to reclassify consumers as “businesses” as soon as they go beyond even minimal turnover thresholds on sites such as ebay, or specialist interest websites such as ravelry.com, is unnecessarily heavy handed.

²⁴

http://ec.europa.eu/consumers/rights/cons_acquis_en.htm, at 2.

Information given by OFT indicates that data on consumer detriment on C2C platforms are not readily available and estimations show that levels of detriment are relatively low.²⁵ If the negative impact of consumer-to-consumer transaction is low, legislative interference is likely to be counterproductive.

In the long term however, Internet transactions challenge the very validity of the consumer/business distinction.

BC4. If not, what additional essential consumer protection would be required?

BC5. Other jurisdictions have positive reporting requirements (such as requiring businesses to provide information to authorities) – should the UK? What are the advantages and disadvantages?

See above. Reporting requirements create a dilemma: they are necessary for efficient market solutions, but can create distrust. Reporting without publicising has its own benefits – enabling in particular more focussed responses by law enforcement, resource allocation by government agencies, general intelligence gathering, and also contribute to necessary academic research into new technological responses. Anonymous/confidential reporting requirements should definitely be considered for these reasons.

More care needs to be taken to determine how, if at all, this data is made public (also taking account FOI principles)

BC6. Should the database generated by businesses about suspected fraud be searchable to contributing businesses? If not, what incentive is there for businesses to contribute?

The possibility that the database by businesses raises several issues:

- It could result in circumvention of the consented restrictions defined by users on the use of their data.
- It can result in profiling of likely victims, in addition to likely perpetrators which could exclude the most vulnerable members of society from certain services.
- Even if used only for profiling/identification of suspects, acting on mere suspicion (especially if the reliability and accuracy of the database is low) raises due process concerns.
- It could be used by competitors to create negative publicity.

Technological solutions similar to ID management, and “privacy by design” that uses suitable anonymisation methods while still allowing relevant benefits, can partly address this issue.

BC7. Should the UK be using co-regulation more extensively to help shape consumer protection on the internet, or is self-regulation sufficient? Why?

²⁵ Promoting Business Compliance,
<http://www.offt.gov.uk/OFTwork/consultations/current/eprotection/>, at 3, 4.

Self-regulation should be promoted within online businesses because of their capacity of detecting problems and creating innovative ways of solving it, within the limits of UK law. This positive effect of self-regulation should be complemented by co-regulation in order to harmonise private solutions developed by businesses. Co-regulation is desirable to ensure the preconditions of market solutions – transparency, access to information, low transaction costs – are met. It is also necessary for solutions such as ADR that work best in the shadow of the law, and against the background of possible legal intervention.

BC8. Given other challenges for UK internet enforcers, should the UK be doing more to reduce spam and if so, what?

The UK should stimulate persons (natural and juridical) to complain about spam. More than being a problem of privacy, spam is affecting effectiveness of the Internet functions. They could expose people not only to offensive content but also to viruses, worms and others malware.²⁶ Individual damages sometimes do not properly reflect the global damage that spam produces on the web. In *Robert v Media Logistic* and *Dick v Transcom Internet Services*, one of the few cases where spammer successfully sued, the damages repair was very low (£ 300 and £ 750 respectively).²⁷ There are cases in the UK that accept that the Privacy and Electronic Communications Directive (PECD) does not only protect individuals affected by spam but also networks.²⁸ Foreign experiences show that damages claimed by network could represent US \$ 4,000,000.²⁹ If claimed damages connected with spam could increase that much in the UK that could discourage spammer for interfering with the net.

DP law fails in several aspects to meet this challenge. It does not address the damages inflicted on non-natural persons, and it assumes a specific *modus operandi* by spammers that may soon be obsolete (in particular, the need to hold data even in the form of email lists may be replaced by auto-generated spam emails that simply generate random addresses, or by spam bots that do not store email addresses they harvest from the web).

BC9. Do you agree with the approach set out below (on spam)? Specifically who is best placed to do it, how and who should pay?

BC10. Should the OFT be focusing effort on inspections and websweeps (using software tools where appropriate)? What other approaches could we take and why?

Technology supported, intelligent websweeps are a cost efficient way to identify offending websites.³⁰ However, the improvement of detection needs a corresponding set of sanctions. Careful incorporation of privacy protecting measures is also necessary, in

²⁶ Edward, Lilian, Consumer Privacy Law 1, in L Edwads and C Waelde (eds) *Law and the Internet*, 489-510, at 494.

²⁷ Ibid, at 497.

²⁸ *Microsoft v MacDonald* (trading as Bizads) [2006] EWHC 3410 (Ch).

²⁹ Edward, Lilian, Consumer Privacy Law 1, in L Edwads and C Waelde (eds) *Law and the Internet*, 489-510, at 497.

³⁰ Schafer, Burkhard, Kingston, John; Vandenberghe, Wim “No Model Behaviour: Ontologies for Fraud Detection” in Benjamins, Richard (eds) [Law and the Semantic Web](http://www.law.ed.ac.uk/ahrc) (Springer, 2005) pp. 233-247.

particular since “mass communication” can and does also play an important social and political function, with the distinction between illegitimate spam and free speech protected political mass communication can be difficult to make (and go beyond currently available technologies to automatize the process).

Settings up suitable “honeytraps” which are only activated by illicit measures are in this respect often a more reliable and privacy-preserving tool than blanket monitoring of activities.

Enforcement

E1. Do you agree with our approach of building on the BIS funded project to develop the enforcement capability of the Office of Fair Trading (OFT) and TSS? What else could the OFT and other enforcers do to help support and build on the project?

Even the best regulation in relation to e-commerce and consumers is ultimately inefficient if authorities are not able to understand how the system works and which are the measures that should be taken for solving the conflicts that are develop in this area of the society.

This proposition is very interesting because it creates opportunities to share tools and training across different public departments, which will allow the UK to have an integrated and therefore efficient enforcement mechanism.

E2. Are the suggested skills and types of cases specified at each level of the enforcement framework appropriate and achievable (See Diagram 1: Internet Enforcement Framework)? If not, please state why not, and any alternatives you can suggest.

In general terms the Diagram contain a consistent mechanism for developing and Internet Enforcement Framework. The only not convincing aspect of the diagram is the minimal participation that police could have in level 2 (Medium complexity to High detriment). Police is a public entity with special attributions that cannot be supplanted by other public department. Clearly its participation will not be necessary in basic conflicts such as platform seller failing to deliver goods, but it could be relevant for issues related to multiple breaches. Thus, police should be capacitated for conflicts not only related to serious organized crime.

E3. Local authorities have many competing priorities for their resources. What can we do to ensure that developing the minimal level 1 set of capabilities is given an appropriate amount of priority?

Market based solutions which are typically targeted at consumers have the above-mentioned shortcomings – in particular the fiction of the informed consumer. By contrast, local authorities competing for companies to move to their jurisdiction do not face this issue. Stimulating competition between local authorities is therefore a potential avenue to incentivise local authorities – which requires however a joint up approach to UK wide planning.

E4. What else could we be doing with the CPC network that would benefit the UK?

The consultation text proposes to develop a programme with the Consumer Protection Cooperation Regulations (CPC). This programme could coordinate best practice exchange, sharing of information and tools across the CPC network, and cooperate and engage in joint investigations. The propositions for working in coordination with the CPC is interesting and well develop. The only element that could be suggested is the exchange of expert all across the countries that participate of CPC. This can allow authorities to understand from a practical point of view different reality of countries related to CPC. This experience can allow CPC to be more effective in its coordination, especially in cross-borders investigations.

E5. Will the approach outlined above provide a balance between appropriate consumer protection and innovation (please give reasons)? What level of ongoing evaluation of this area is appropriate?

The approach outlined above consist of monitoring internet market developments, taking action where necessary to ensure the legislative environment remains effective, such as precedent setting cases, and working with industry to develop self-regulation or co-regulation approaches. This is not a new mechanism. Mixing traditional regulation with innovative mechanism of protection is a characteristic of the Internet development. It is possible to declare that this method is giving good results, specially considering the development of e-commerce in the UK. This mechanism can keep working in a positive way only if the government is able to canalize consumers concern so businesses are able to explore new ways of dealing with those issues. If government does not develop this relevant function, businesses will not have proper information about the reality of the system and they will not feel pressure for finding solutions. Thus, communication is the essential element for achieving this balance.

E6. Is there currently lack of clarity, or do gaps exist in relation to how legislation applies to online markets (please give reasons and examples where possible)?

There is no clarity in the UK about the applicability of the right to withdraw from online auctions. The Distance Selling Directive excludes auctions from it regulation so countries should adopt a decision about this topic. Other countries of the UN already regulate this topic, such as France and Estonia. The UK had not adopted yet decision about it.³¹

Digital goods are an important object of electronic contract. The UK regulation does not provide consumers the possibility of cancel contracts whenever the contract is about digital goods.³² This situation creates inequalities between e-consumers.

E7. Are there any e-consumer protection areas where the legal community would find further clarification helpful?

There is a basic gap that affects the online market, which is related to the formation of

³¹ Riefa, Christine and Hörnle, Julia, The Changing Face of Electronic Consumer Contracts, in L. Edwads and C Waelde (eds) *Law and the Internet*, 89-119, at 117. See also, Riefa, Christine, "To Be or not to Be an Auctioneer? Some Thoughts on the Legal Nature of Online eBay Auctions and the Protection of Consumers." (2008) 31 *Journal of Consumer Policy*, 167-194.

³² Reg 13 (d) Consumer Protection (Distance Selling) Regulation 2000.

contracts.³³ The E-commerce Directive regulate in a broad way electronic contract because of the impossibility of harmonising rules of formation of these contracts across Europe.³⁴ Thus, there is no rule that defines the moment which should be understand that there is a formation of a contract. The Electronic Communication Act 2000, having the opportunity of defining that moment and therefore giving certainty to consumers, chose to simply adopt the approach of the EU.³⁵ Even though this absence of regulation in the UK has been fulfilling by courts it would be more appropriate for the system at least to confirm that the same rules are applicable in e-contracts.

E8. Will the benefits of using a database to avoid duplication in the manner proposed outweigh the costs (the additional time needed to input meaningful data)? Is CRW an appropriate focus in terms of trying to minimise duplication through greater coordination?

Coordination of data is a highly useful element for enforcement. This database should not constitute an additional effort for authorities if the form is develop in a way that it could be populated with the basic information that an authority should process in the local database. On the contrary, authorities should spend less time in a case if they have appropriate access to value information that will help them to understand and resolve the conflict.

E9. What could be done to minimise the burden of inputting data? Is this a substantial problem?

As explained above, it is important to create a database whose content is coordinated with local forms that authorities must fulfil on their daily work. Thus, there will be no requirement of duplicating work on a same issue.

E10. Are there better established alternative systems for recording case interest and development?

E11. Do you consider that a cross agency enforcement group would be useful? What are sensible alternatives?

Centralised cross-agency enforcement groups are modelled on traditional models of control, that seem dated giving the networked, decentralised nature of the internet. Rather than imposing a centralised model of control and governance, state responses to Internet regulation can attempt to mirror more directly the advantages of the decentralised, highly networked Internet that they purport to regulate. Standardised

³³ Tahat, Hisham, "Factors Affecting E- Commerce Contract Law," 20th BILETA Conference: Over-Commoditised; Over-Centralised; Over-Observed: the New Digital Legal World?, available at <http://webcache.googleusercontent.com/search?q=cache:X3Id8S9ZX2UJ:www.bileta.ac.uk/Document%2520Library/1/Factors%2520Affecting%2520E%2520commerce%2520Contract%2520Law.pdf+conflict+consumer+e-commerce+UK&hl=en&gl=uk>, at 5.

³⁴ Riefa, Christine and Hörnle, Julia, "The Changing Face of Electronic Consumer Contracts", in L. Edwards and C. Waelde (eds) *Law and the Internet*, 89-119, at 101.

³⁵ Ibid, at 98.

Information exchange protocols between autonomous parts of a highly interconnected system take the network paradigm more serious.

E12. Which agencies should be included as part of the group and what other roles do you think the group should play?

This group should be conformed by agencies with different roles to play in the government. BIS, OFT, Local Authority Trading Standards Services (TSS), Serious and Organised Crime Agency (SOCA), Police Central e-crime Unit (PCeU), and the Police are entities that should be presented in this agency.

E13. In terms of horizon scanning, do you see any merit in developing small groups to monitor new and emerging developments?

The creation of a small group is not really necessary. New and emerging developing should be analysing by every entity that deals with e-commerce according to their daily work. The collated data emerges then automatically from that interaction, rather than additional work by a centralised group that acts as a recipient of information generated solely for that purpose.

E14. What do you see as the biggest barriers to sharing intelligence or data?

One thing is having an agency whose purpose is trying to coordinate functions of different public entities in order avoid gap. Another thing is to intent that this agency will access to all the data available in every different entity that collaborates with the agency. Barriers such as the one created by Data Protection Act 1998 and Enterprise Act 2002 (EA) are relevant because those protect other public interest that are also important for the development of the UK society. Thus, legal limitation for sharing intelligence or data should be respected. Single points of data collection are also particularly susceptible to security breaches and data security problems, and also pose challenges for quality control of data.

In addition, fast and efficient decision-making can suffer from too much data just as much as from too little.

These issues cannot be addressed just by managerial or structural reforms, they require mostly technological solutions: secure information exchange with build in privacy protection, combined with efficient search and data mining tools.³⁶

E15. What do you believe could be done to remove barriers and increase and improve intelligence and data sharing practices?

As it was explained above, legal barriers such as the one created by Data Protection Act 1998 and Enterprise Act 2002 (EA) are relevant because those protect other public interest that are also important for the development of the UK society. Thus, legal limitation for sharing intelligence or data should be respected.

³⁶ Buchanan, Willam, Fan, Lu, Lawson, Alistair, Schafer, Burkhard, "Interagency Data Exchange Protocols as Computational Data Protection Law". JURIX 2010, forthcoming.

E16. Are there any additional third-party data sources that could be used to help enhance the intelligence capabilities of the OFT and TSS?

In particular, the OFT should analyse report of civil society agencies in order to be updated about the information that these organizations gather about the consumer regulation and enforcement on the online context.

E17. How can we maximise the use of IMD and other data sources?

Even though the information manage by the National Intelligence Management Database (IMD) could have different uses, its content cannot necessarily be maximized because of the restrictions of data protection. It is important for the government to accept those restrictions.

E18. Do you agree that developing systems to monitor emerging trends, etc, will be valuable in terms of intelligence gathering and an appropriate use of resource in this area?

Yes. It is pivotal for the government to try to identify and monitor emerging trends in order to make enforcement more efficient. Initiatives such as an e-consumer protection Enforcement Forum constitute an appropriate space for that purpose. Businesses associations also could bring valuable information for identifying emerging trends.

E19. Is the OFT the right body to coordinate and analyse consumer protection intelligence arising from the various sources that exist?

The agency in charge of analysing this data should not be the OFT. This entity has important roles in relation to essential issues of e-commerce. It can investigate and prosecute a number of criminal offences under competition and consumer law.³⁷ The work of coordination could imply that other entities will have to accept some recommendations to be applicable in the way they work. In this sense, it is better to have an agency not guided by OFT but by a third public entity that does not have direct interest on the area.

Monitoring the strategy and developments in online markets

M1. Do you agree with our approach to monitoring the impact of the strategy and wider developments in online markets?

The idea of monitoring the impact of the strategy and wider development in online market seems to be coherent with the other proposal of improving enforcement, consumer empowerment, and business compliance. All these projects include relevant governmental coordination, and resources expenses. Thus, it is important to verify the achievement of the objectives.

M2. Do you agree with the anticipated outcomes we expect to achieve from the implementation of the proposed actions?

³⁷

http://www.offt.gov.uk/about-the-offt/legal-powers/enforcement_regulation/prosecutions/

